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No. 81-108

# In the Supreme Court of the United States

OCTOBER TERM, 1980

FEDDERS CORPORATION AND SUBSIDIARIES, PETITIONERS

*v.*

COMMISSIONER OF INTERNAL REVENUE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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In this federal income tax case, petitioner seeks review of a determination that a portion of the purchase price it paid to acquire an ongoing business was allocable to the intangible assets of that business.

The pertinent facts may be summarized as follows: In 1968, petitioner purchased the Norge Division of the Borg-Warner Corporation (Pet. App. 5a). The agreement of sale assigned to petitioner various Norge assets, including intangible assets, but did not allocate the lump-sum purchase price among the assets (Pet. App. 27a). In computing its federal income taxes, petitioner allocated no part of the purchase price to the intangible assets (Pet. App. 23a).[1] On

[1]The allocation of purchase price has numerous tax consequences that arise primarily from the tax basis that is acquired in the various Norge assets, which in turn affects, for example, the gain to be realized upon the collection of the accounts receivable and the sale of the inventory, as well as the amount of depreciation that may be claimed on the depreciable assets.

audit, the Commissioner of Internal Revenue determined that more than $23 million of the purchase price was properly allocable to the intangibles (Pet. App. 23a-24a).[2]

In this proceeding brought by petitioner for redetermination of the ensuing deficiencies, the Tax Court found that petitioner had acquired intangibles valued at $4,500,000 in its purchase of Norge (Pet. App. 33a). The court ruled that, while petitioner had acquired no "goodwill" as that term is used to mean an intangible that comprises an excess earnings capacity, petitioner had nevertheless received an intangible of value in acquiring the Norge name, which it used extensively following the purchase (Pet. App. 30a-31a). The Tax Court determined the value of the Norge name by ascertaining the amount that it would cost to establish consumer awareness of a brand name and reducing this figure to reflect what would in any case have to be expended to maintain such a name and to reflect certain negative attributes of the Norge business (Pet. App. 32a-33a). The court of appeals affirmed (Pet. App. 1a).

1. The allocation of a portion of the purchase price to the Norge name by the decision below is correct, particularly in view of petitioner's continued use of the name and its own representations to the public as to the value of the Norge name. In any event, the allocation of a lump-sum purchase price among the various assets of a business is a factual

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[2]Borg-Warner had assigned approximately $22 million to the intangibles for its tax purposes and, in order to protect the revenue, the Commissioner of Internal Revenue issued Borg-Warner a notice of deficiency in which he determined that the intangibles had no value (Pet. App. 23a-24a). Borg-Warner's case was consolidated with that of petitioner in the Tax Court. Currently pending in the Seventh Circuit (Nos. 80-1818 and 80-1855) are Borg-Warner's appeal on an unrelated issue and the Commissioner's protective cross-appeal on the question presented in the petition in this case.

determination. See, *e.g.*, *R.M. Smith, Inc.* v. *Commissioner*, 591 F. 2d 248, 251 (3d Cir. 1979). There is accordingly no basis for further review of this determination. *Rudolph* v. *United States*, 370 U.S. 269, 270 (1962).

2. Contrary to petitioner's assertion (Pet. 5-8), the decision below does not conflict with *Concord Control, Inc.* v. *Commissioner*, 615 F. 2d 1153 (6th Cir. 1980), on the question whether excess earnings capacity must be present in order for there to be goodwill in a business. *Concord Control* held that there could be no goodwill absent an expectancy of continued patronage or a competitive advantage, and did not even discuss a need for the presence of excess earnings capacity. See also *Skilken* v. *Commissioner*, 420 F. 2d 266 (6th Cir. 1969). At all events, the courts below found that goodwill (as that term is used to mean an intangible comprising an excess earnings capacity) was not present, but that there was a distinct intangible value in the Norge name. Thus, this case is an inappropriate vehicle in which to establish the legal definition of goodwill for tax purposes.[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
*Solicitor General*

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[3]The Court has discussed both the definition of goodwill and the value of a trade name in other contexts. See *Menendez* v. *Holt*, 128 U.S. 514, 521-522 (1888) (goodwill); *Friedman* v. *Rogers*, 440 U.S. 1, 11-16 (1979) (trade name).

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